82-1725

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ALEXANDER L. STEVAS,

No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

V.

NORMAN C. GAGNON and
PHILIP C. CHOUINARD,
Respondents

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CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
JUDICIAL COURT OF MASSACHUSETTS

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## QUESTIONS PRESENTED

1. Where a statute clearly and unambiguously defines the crime of possession of heroin with intent to distribute, and clearly and unambiguously provides a maximum penalty therefor, is the statute violative of Fourteenth Amendment due process requirements, and therefore unenforceable, merely because it includes provisions for a minimum penalty which are inconsistent.

2. Where a criminal statute provides sufficient notice of the conduct prohibited and the maximum potential penalty therefor, does ambiguity in its provisions relating to the minimum penalties for such conduct require that the entire statute be voided as unconstitutionally vague.

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The petitioner Commonwealth of Massachusetts respectfully prays that a writ of certiorari issue to review the decision of the Massachusetts Supreme Judicial Court, holding that Mass. Gen. Laws, ch. 94C, §32(a) (amended 1982), which prohibits and punishes the possession of heroin with intent to

distribute, is unconstitutionally vague; the writ to issue only in the event this Court should allow the appeal or grant a writ of certiorari in No. 82-1558.

## OPINION BELOW

The initial opinion of the Supreme Judicial Court is reported as Commonwealth v. Gagnon, 387 Mass. 567, 441 N.E.2d 753 (1982). The opinion after rehearing is reported under the same name at 387 Mass. 768, 443 N.E.2d 407 (1982). The opinions are reprinted in the Appendix hereto.

## JURISDICTION

On November 4, 1982, the Supreme Judicial Court entered judgment declaring Mass. Gen. Laws, ch. 94C, §32(a) void for vagueness, and remanding the case to the Superior Court for dismissal of the indictments. The

Commonwealth's Petition for Rehearing was granted in part on November 17, 1982. On December 23, 1982, the Supreme Judicial Court entered judgment remanding the case to the Superior Court for dismissal of the indictments, except as to the lesser included offense of possession of heroin, declaring that defendants could be found guilty of that offense and sentenced pursuant to Mass. Gen. Laws ch. 94C, §34.

Respondents filed an appeal which was docketed in this Court on March 18, 1982 and petitioner received a copy of the jurisdictional statement on March 22, 1983. Because the appeal should be regarded as a petition for writ of certiorari pursuant to 28 U.S.C, §2103, this cross-petition is timely pursuant to Supreme Court Rule 19.5. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. V;

U.S. CONST. amend. XIV, §1;

Mass. Gen. Laws, Ch. 94C, §32(a) (amended 1982).

## STATEMENT OF THE CASE

Respondents were indicted for unlawful possession of heroin with intent to distribute, as proscribed by Mass. Gen. Laws, Ch. 94C, §32(a) as it was then in force. Before trial, they moved to dismiss the indictments on the ground that §32(a) was unconstitutionally vague. The motions were denied by the Superior Court. Respondents then proceeded to trial, and were convicted as charged. Both defendants were sentenced to the maximum term of

imprisonment allowed by the statute. On direct appellate review by the Supreme Judicial Court, the convictions were reversed on the ground that the challenged statute was void, in that it failed to provide sufficient notice of the penalties attaching to the criminal conduct. The single issue on this appeal was the constitutionality of §32(a).

Section 32(a) unambiguously described the conduct subject to punishment, and made clear that the maximum penalty was ten years imprisonment or a $10,000 fine, or both. The statute was inconsistent, however, with regard to the minimum punishment which could be imposed. Although it provided for imprisonment "for not less than one year" or "a fine of not less than $1,000," it further

stated, "[a]ny person convicted of violating this subdivision shall be punished by a mandatory minimum one year term of imprisonment." Because the state court was unable to determine whether the legislature intended to allow the imposition of a fine alone, and whether it intended to allow suspension of any one year sentence imposed, the court concluded that the statute "provides no notice as to the potential penalties for [its] violation." 387 Mass. at 573. By this cross-petition for certiorari, the Commonwealth seeks review of this portion of the Supreme Judicial Court's decision.

On the Commonwealth's motion, the court allowed a rehearing only as to the issue whether the defendants could be resentenced for the lesser included

offense of possession of heroin, under Mass. Gen. Laws, Ch. 94C, §34, which unambiguously provides a maximum penalty of not more than two years imprisonment, or a fine of not more than $1,000, or both. The court held that the defendants could be so sentenced, and remanded the case to the Superior Court. It is this determination which the respondents seek to appeal.

REASONS FOR ALLOWANCE OF THE WRIT

In declaring the statute at issue void for vagueness, the Supreme Judicial Court decided important questions of federal law which have not been, but should be, settled by this Court. These questions include whether the federal constitution requires that a criminal statute provide notice of a minimum penalty, and whether it requires

dismissal of indictments which allege violation of a statute which contains inconsistent provisions for a minimum penalty. A further reason for allowing the writ is that if respondents' appeal is allowed, or if they are granted a writ of certiorari, proper resolution of their claims may be impossible without consideration of the issues raised in this cross-petition.

## ARGUMENT

### I. THE STATE COURT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT

In reaching the conclusion that the statute at issue was unconstitutionally vague, and therefore unenforceable, the Supreme Judicial Court erroneously relied on two inapposite decisions of this Court. The first, United States v. Evans, 333 U.S. 483 (1948), concerned a federal statute. The case was decided

entirely on the basis of principles of statutory construction and the bounds of judicial interpretation. The opinion makes no reference to constitutional principles or requirements. Moreover, Evans was concerned with a statute which, on its face, provided no penalty for the crime with which the defendants were charged. The indictments were dismissed because no punishable offense was alleged.

In the second case, United States v. Batchelder, 442 U.S. 114 (1979), although this Court observed that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute," the statement was dicta because no vagueness was found in the statutes at issue. Batchelder sets

out no standards for determining what constitutes "sufficient clarity," does not consider or discuss which aspects of the "consequences" of a violation must be unambiguously stated, and makes no mention of what relief is appropriate if a statute is found to contain vague punishment provisions.

It is one thing to hold that the constitution is offended when a defendant is punished without first being given notice that his or her conduct is prohibited, and notice that some form of punishment may be imposed. It is quite another to hold, as did the Supreme Judicial Court, that due process is offended by a conviction and sentence of ten years' imprisonment merely because the defendant may not have been able to determine whether a one year sentence would have been mandatory or

discretionary.

The Supreme Judicial Court was also wrong in its conclusion that constitutional principles required that the entire statute be vacated. It is submitted that the constitution does not mandate such a drastic remedy in these circumstances. Due process requirements would have been wholly satisfied had the court merely struck down the offending minimum penalty provisions and left the definition of the crime and the maximum penalty in tact. Instead, the court unneccesarily eliminated a well-defined crime with clearly stated maximum potential penalties. The constitution is belittled by such an illogical result.

## II. PROPER RESOLUTION OF THE ISSUES RAISED BY RESPONDENTS' APPEAL MAY DEPEND ON RESOLUTION OF THE ISSUES RAISED IN THIS CROSS-PETITION.

In their appeal in Case Number 82-1558, respondents assert that because they were indicted under an unconstitutional statute, they may not be convicted and sentenced for a lesser included offense. However, if this Court concludes that the statute was not unconstitutional in the first place, the issues raised by the appeal obviously need not be reached. Presumably, the case would be remanded to the state court, where the convictions and sentences for the greater offense could be reinstated.

Moreover, a determination that the Constitution did not require dismissal of the greater offense would suggest that any remedy granted by the state court does not present a federal issue.

That is, respondents could not be heard to complain about the constitutionality of being convicted of the lesser offense if the Constitution would sanction their convictions of the greater offense.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be allowed if respondents' appeal is permitted or if they are granted a writ of certiorari.

Respectfully submitted,

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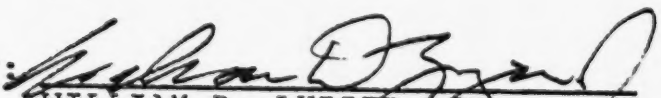
By: 
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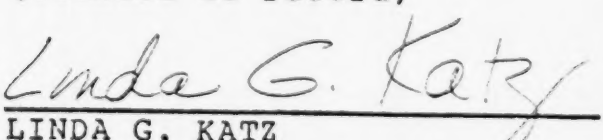
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## APPENDIX A

(Text of Constitutional Provisions and Statutes Involved)

### U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASS. GEN. LAWS
CH. 94C, §32(a)
(amended 1982)

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class A of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than one year and not more than ten years, or by a fine of not less than $1,000 and not more than $10,000, or both. Any person convicted of violating this subdivision shall be punished by a mandatory minimum one year term of imprisonment.

APPENDIX B

E-2894 S.J.C.

COMMONWEALTH vs. NORMAN GAGNON
(and two companion cases)[1]

NOLAN, J. The single issue in this case is the constitutionality of G.L. c. 94C, §32(a). We hold that it is unconstitutional.

In February and March, 1981, an Essex County Grand Jury returned two indictments against Norman Gagnon and one against Philip C. Chouinard for the unlawful distribution of heroin in violation of §32(a) of G.L. c. 94C, the Controlled Substances Act. In May, 1981, the defendants moved to dismiss the indictments on the ground that §32(a) "is unconstitutionally vague and ambiguous in that its penalty clause comprehends two inconsistent penalty

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1/ One is against Norman Gagnon; the other is against Philip C. Chouinard.

schemes and is therefore void." The motion was denied on August 3, 1981, following a hearing held on July 29, 1981. The defendants thereafter were convicted as charged, following jury-waived trials on November 23, 1981. Chouinard was sentenced to a ten-year term at the Massachusetts Correctional Institution at Concord and fined $500.00. Gagnon was sentenced to two concurrent terms of ten years at M.C.I. Concord and fined $500.00 on each indictment. The only issue raised by the defendants on appeal is the denial of their motion to dismiss. Their motions should have been allowed.

General Laws. c. 94C, §32(a), as appearing in St. 1980, c. 436, §4, provides: "Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to

manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than one year and not more than ten years, or by a fine of not less than $1,000 and not more than $10,000, or both. Any person convicted of violating this subdivision shall be punished by a mandatory minimum one year term of imprisonment." The defendants contend that the second sentence, requiring a "mandatory minimum" term of imprisonment, is so inconsistent with the optional language of the first sentence, which allows punishment by imprisonment, fine, or both, as to make the statute unresolvably ambiguous. The Commonwealth does not dispute the apparent inconsistency, but it argues that a reasonable interpretation of the

penalty provisions "in light of their legislative history, the legislature's intent, and the practical meaning of the statute when viewed as a whole and along with related Controlled Substances Act statutes, readily establishes the statute's validity."

"It is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" United States v. Batchelder, 442 U.S. 114, 123 (1979), quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). This principle applies to sentencing as well as substantive provisions. United States v. Batchelder, supra. United States v. Evans, 333 U.S. 483 (1948). We are required by ordinary rules of statutory construction to construe any criminal

statute strictly against the Commonwealth. Commonwealth v. Clinton, 374 Mass. 719, 721 (1978). Commonwealth v. Devlin, 366 Mass. 132, 137-138 (1974). However, we recognize that "this maxim is a guide for resolving ambiguity, rather than a rigid requirement that we interpret each statute in the manner most favorable to defendants." Simon v. Solomon, 385 Mass. 91, 102-103 (1982). We may look to outside sources to determine the meaning of a statute whose language is unclear. Aldoupolis v. Commonwealth, 386 Mass. 260, 264 (1982), cert. denied, 51 U.S.L.W. 3257 (U.S. Oct. 4, 1982) (No. 82-5159). Our purpose is to determine the Legislature's intent so that we may give effect to it in our construction of the statute. See, Commonwealth v. Chretien, Mass. Adv. Sh.

(1981) 661, 669-670. While we shall indulge every rational presumption in favor of the statute's validity, Commonwealth v. Lammi, 386 Mass. 299, 301 (1982), any reasonable doubt as to the meaning of the statute or the intention of the Legislature which lingers after an investigation of outside sources must be resolved in favor of the defendants. See Aldoupolis v. Commonwealth, supra at 267. See also 3 C. Sands, Sutherland Statutory Construction §59.04, at 13 (4th ed. 1974). Since it is conceded that the penalty provisions of §32(a) are facially inconsistent, we shall examine the statutory history and context of the section to see whether this inconsistency can be resolved in light of any legislative intention there expressed.

General Laws c. 94C, the Controlled Substances Act (Act), was enacted in 1971. St. 1971, c. 1071, §1. It repealed the various sections of G.L. c. 94 which, until then, had regulated the manufacture and distribution of drugs. St. 1971, c. 1071, §2. Prior to 1971, a judge could suspend the imposition of the sentence of a person convicted on first offense for illegally selling or distributing narcotics, but he could not suspend sentence for those convicted of a second or subsequent offense. G.L. c. 94, §§212A, 217, 217E, repealed by St. 1971, c. 1071, §2.

General Laws c. 94C, §32, as originally enacted, provided that a person convicted of a first offense involving a class A or B controlled substance "shall be punished by imprisonment in the state prison for not

more than ten years or in a jail or house of correction for not more than two and one half years or by a fine of not more than twenty thousand dollars, or both such fine and imprisonment." Those previously convicted of a felony under the Act or corresponding prior law were subject to punishment by longer State prison terms plus a fine. The language contained in the prior law prohibiting suspension of sentences for second offenses was not included in the Act. However, since a second offense was punishable by a prison term plus a fine, G.L. c. 279, §1A, prohibited suspension. See note 5 infra.

Amendments to the Act in 1980 (St. 1980, c. 436, §4) replaced former §32 with present §§32 through 32H, each dealing with specific classes of drugs. Subsection (b) of the present §32 deals

with those previously convicted of the same offense or related offenses in other jurisdictions and provides that they shall "be punished by a term of imprisonment in the state prison for not less than five years and not more than fifteen years. Any person convicted of violating this subdivision shall be punished by a mandatory minimum term of imprisonment of five years in the state prison. A fine of not less than $2,500 and not more than $25,000 may also be imposed, but not in lieu of the mandatory term of imprisonment, as authorized herein."

General Laws c. 94C, §32H, provides that a sentence imposed under §32(b), and certain other sections of the Act,[2/] shall not be "suspended,

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2/ The other sections are 32A (b), 32B (b), 32D, 32E or 32F.

reduced, or a term of probation served until the defendant shall have served the mandatory term of imprisonment as authorized in said sections." This provision was new in the 1980 amendments although it echoed earlier provisions in the pre-1971 drug laws.

From this history, the Commonwealth concludes that the Legislature clearly intended to distinguish between first and subsequent offenders and to allow suspended sentences for the former.[3/] The Commonwealth therefore asks us to read §32(a), in apparent concordance with this intent, as to allow punishment

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3/ The Commonwealth also points out that a proposed bill, 1982 Senate Doc. No. 1963, would retain the penalty distinctions between first and subsequent offenders.

by imprisonment, or fine, or both, and as to provide that no term of imprisonment imposed should be for less than one year although execution could be suspended. It finds particular support for this reading from the facts that the Legislature did not include in §32(a) any provision that would preclude either the imposition of a fine in lieu of imprisonment as it had in §§32(b), 32A(b), 32B (b), 32D, 32E, and 32F, and did not include §32 (a) within §32H.

We think that such a reading takes insufficient account of what the Legislature did by inclusion of the "mandatory minimum" provision, for the punishment scheme suggested by the Commonwealth would have been in effect without it. The Legislature must be presumed to have been aware of the reach

of G.L. c. 279, §§1[4/] and 1A,[5/] when

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4/ General Laws, c. 279, §1, as amended through St. 1975, c. 347, provides in pertinent part: "When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix. When a person so convicted is sentenced to pay a fine and to stand committed until it is paid, the court may direct that the execution of the sentence, or any part thereof, be suspended for such time as it shall fix and in its discretion that he be placed on probation on condition that he pay the fine within such time. ... The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of a crime punishable by death or imprisonment for life."

5/ General Laws, c. 279, §1A, as amended through St. 1978, c. 478, §309, provides in pertinent part: "When a person convicted before a court is sentenced to fine and imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix... This section shall not permit the

(footnote continued)

it amended §32. See, Aldoupolis v. Commonwealth, supra at 266; Commonwealth v. King, 202 Mass. 379, 388 (1909). By inclusion of the "mandatory minimum" provision in G.L. c. 94C, §32(a), the Legislature might well have intended at least four possible penalty schemes, each of which would be more or less consistent with its evident purpose to treat first offenders more leniently than repeat offenders: (1) at least a one-year sentence with suspension possible; (2) at least a one-year sentence with suspension impossible although payment of any fine imposed

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(footnote continued)

suspension of the execution of the sentence of any person convicted of a crime punishable by imprisonment for life or of a crime an element of which is being armed with a dangerous weapon, or of any person convicted of any other felony if it shall appear that he has been previously convicted of any felony."

could be suspended if not prohibited under G.L. c. 279, §1A; (3) a fine alone, or imprisonment for at least a year, or both, with suspension possible as to each unless otherwise prohibited; (4) a fine alone, or imprisonment for at least one year, or both, with only the fine suspendible unless otherwise prohibited. Viewed in this light, the statutory history is inconclusive.

As an additional basis for our decision, we note that §32(a) apparently would allow a sentence to State prison for a minimum, indeed a maximum, term of less than two and one-half years. General Laws c. 279, §24, however, provides that the minimum term of a State prison sentence "shall not be less than two and one half years." Since a felony is defined as "[a] crime punishable by death or imprisonment in the state prison," with all other crimes

being misdemeanors, G. L. c. 274, §1, it would appear that §32(a) is intended to be a felony provision. However, a person convicted under §32(a) and sentenced to less than two and one-half years would thereby stand convicted of a felony for which he could not be sent to State prison. Compare Sheriff of Middlesex County v. Commissioner of Correction, Mass. Adv. Sh. (1981) 1225 (absent special circumstances, judge who sentences defendant to a term of more than two and one-half years may not order him held in custody of county sheriff without sheriff's consent). We need not decide whether the conflict between G. L. c. 279, §24, and G. L. c. 94C, §32(a), can be resolved.[6/] But

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6/ Proposed legislation contained in Senate Doc. No. 1963 attempts to eliminate this problem by restoring the provisions allowing sentences to a jail or house of correction which were removed in the 1980 amendments.

add to this confusion the ambiguity of the "mandatory minimum" provision, and it is clear to us that this statutory maze provides no notice as to the potential penalties for violation of §32(a). The statutory context of §32(a) here only serves to exacerbate that subsection's inherent ambiguities.

We must give effect to all the language in a statute. Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 687-688 (1972). Should we accept the construction urged by the Commonwealth, we would be left with a two sentence subsection whose second sentence would be contrary to the otherwise clear meaning of the first sentence. The Commonwealth's reading would not require us to interpret ambiguous language to make the statute clear but to ignore that language which makes the statute unclear.

What was said in United States v. Evans, 333 U.S. 483, 495 (1948), is pertinent here. "If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large."

There is reasonable doubt about the meaning of G. L. c. 94C, §32(a), and the Legislature's intention in passing it. Although we recognize the Legislature's efforts to devise realistic and effective sanctions against illicit drug trafficking, we cannot resolve this doubt in its favor. See, Aldoupolis v.

Commonwealth, supra at 267. See also, 3 C. Sands, supra. General Laws c. 94C, §32(a), is void for vagueness. The judgments are reversed and the findings set aside. The case is remanded to the Superior Court and the judge is to enter an order granting the defendant's motion to dismiss.

So ordered.

APPENDIX C

E-2894 S.J.C.

COMMONWEALTH vs. NORMAN GAGNON
(and two companion cases).[1]

NOLAN, J. After the Commonwealth filed its petition for rehearing, following the court's opinion reported ante 567 (1982), the court invited the defendants to submit a brief or a letter on the sole issue whether the defendants may be resentenced under G. L. c. 94C, §34, which punishes, inter alia, possession of heroin. The court has treated the letters from the District Attorney and the Attorney General in support of the petition for rehearing as memoranda of law.

The issue of possession as a lesser included offense within the crime of unlawful manufacture and distribution

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1/ One is against Norman Gagnon; the other is against Philip C. Chouinard.

was not argued originally by the Commonwealth in its brief or at oral argument. However, the indictments charge that the defendants did "knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance to wit: Heroin, a class A substance." Under this indictment one who knowingly or intentionally manufactures, distributes or dispenses heroin possesses the heroin, actually or constructively.

The assertion in the dissenting opinion that these defendants can be resentenced under G. L. c. 94C, §32, as it existed before the comprehensive revision of the drug sentencing laws in 1980 (St. 1980, c. 436) cannot be left unchallenged. The dissenting opinion urges this court to apply a "rule of

revival." This argument has not been raised by any of the parties at any point in these proceedings. If we were to follow our usual practice, the issue would be deemed to have been waived by the failure either to brief or argue the point. Mass. R.A.P. 16 (a) (4), as amended, 367 Mass. 921 (1975). Wolfberg v. Hunter, 385 Mass. 390, 392 n.3 (1982). This principle has special force when, as is the case here, the point has not been raised even in the petition for rehearing.

The Commonwealth's failure to raise the point is understandable. The dissenting opinion is simply wrong in suggesting ("[t]here is some precedent," infra at ) that this "rule of revival" has been a part of our jurisprudence. The cases cited in the dissenting opinion deal only with the issue of

severability and do not embrace this so-called "rule of revival."[2/] Even if it were conceded that these cases hint at some notion of "revival," they did not place the defendants on notice that the former G. L. c. 94C, §32, would be applied to them. Other than Commonwealth v. Kimball, 299 Mass. 353

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2/ A fair statement of our law is that a statute which has been declared unconstitutional is not wholly without effect but is unenforceable, see Lawton Spinning Co. v. Commonwealth, 232 Mass. 28, 36 (1919), unless the objectionable portion can be severed. Del Duca v. Town Adm'r of Methuen, 368 Mass. 1, 13 (1975). Thus, subsequent repeal of an unconstitutional statute which, when read in conjunction with a prior statute rendered the prior statute unconstitutional, served to validate the prior statute. Lawton Spinning Co. v. Commonwealth, supra at 32-35. An amendment which eliminated a constitutionally required exception to a State excise tax could be "treated as quite distinct and severable from the prior statutes." Opinion of the Justices, 269 Mass. 611, 615 (1929). An "unimportant exception" to a general prohibition could be severed if the exception were found unconstitutional. Commonwealth v. Kimball, 299 Mass. 353, 360 (1938).

(1938), in which the dictum clearly goes to severability, they are all civil cases and, in addition to their age,[3] provide no indication that the "rule of revival" would ever be applied in a criminal case in this Commonwealth.[4]

The fundamental flaw of the dissenting opinion is its unwillingness to face up to the plain consequences of the court's holding. The issue in this case is whether the defendants had

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3/ The inability of the dissenting judge to cite a single modern decision of this court indicates that it has long been recognized that notions of "revival" have never been applied in our cases.

4/ The closest criminal analogy in our cases suggests that "revival" cannot be used to support a conviction for conduct committed after the repeal of a statute but before it has been deemed revived. See Commonwealth v. Marshall, 11 Pick. 350 (1831).

sufficient notice of the penalty which attached to their conduct to satisfy due process requirements. Therefore it would be reasonable to expect the dissenting opinion to explain how the "rule of revival" provided these defendants with adequate notice of their punishment.5/

It is quite apparent that the application of the "rule of revival" in this case would be unconstitutional. These convictions can be upheld only if the prior G. L. c. 94C, §32, provided adequate notice of the penalty which attached to the defendants' conduct. To reach that conclusion, we would have to

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5/ Focusing mainly on the possible State prison sentences, we note that the minimum State prison sentence under prior G. L. c. 94C, §32, is two and one-half years and under new G. L. c. 94C, §32(a), the minimum sentence is one year. We view that difference as significant.

reason, first, that the new G. L. c. 94C, §32(a), gave adequate public notice of its own invalidity and, second, that the public, thus informed, was then put on further notice that the apparent repeal of the old §32 was ineffective. See United States ex rel. Clark v. Anderson, 502 F.2d 1080, 1082 (3rd Cir. 1974).[6/] Neither of these elements is satisfied here.

Certainly, the Commonwealth would not accept the proposition that the statute gave notice of its own

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6/ The dissenting opinion states that the reasoning of the Anderson case "does not apply here," infra at , since that case dealt with notice of proscribed conduct. Our holding, however, makes clear that the "fundamental tenet of due process that '[n]o one may be required ... to speculate as to the meaning of penal statutes'" applies "to sentencing as well as substantive provisions." Commonwealth v. Gagnon, 387 Mass. 567, 569 (1982), quoting United States v. Batchelder, 442 U.S. 114, 123 (1979).

invalidity. It has argued throughout these proceedings that the statute is constitutional. The trial judge also shared that view. In these circumstances, it cannot be said that the public had any notice that the apparent repeal of the prior statute was ineffective. Since the "rule of revival" has not been adopted by this court, the defendants had no adequate notice of the penalty attaching to their conduct.

Due to the dearth of Massachusetts authority in favor of "revival," the dissenting opinion necessarily falls back on the citation of cases from other jurisdictions.[7/] None of these cases, however, supports the application of a "rule of revival" in the present

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7/ The dissenting opinion does not tell us how these cases provided adequate notice to the defendants in this case of the penalty attaching to their conduct.

circumstances. The cases (1) reach results inconsistent with revival, e.g., Davis v. Wallace, 257 U.S. 478, 484-485 (1922) (where an excepting provision is declared unconstitutional, preexisting law cannot be applied to persons within the exception); (2) relate only tangentially to the instant case, e.g., Chicago, I. & L. Ry. v. Hackett, 228 U.S. 559, 566 (1913) (an unconstitutional Federal statute does not preempt State law); or (3) do not address the present circumstances, e.g., State v. Collins, 528 S.W.2d 814, 815 (Tenn. 1975) (defendant convicted and sentenced under statute in effect at time of his criminal conduct). Moreover, some of the jurisdictions that have adopted a "rule of revival" have held that a person cannot be convicted for a crime committed during the

period which elapses between the "attempted" repeal of the criminal statute under which the defendant was charged and the pronouncement of unconstitutionality of the repealing statute by court decision. See Lutwin v. State, 97 N.J.L. 67 (1922).[8/] This is not unlike the situation here.

The "rule of revival" has little merit. In the present setting, its application would be a form of judicial lawmaking. The amendments to the act in 1980 (St. 1980, c. 436, § 4), worked a comprehensive revision of the former G. L. c. 94C, § 32, and it would be sheer speculation to say what penalty the

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8/ Thus the rule is applied in other jurisdictions prospectively from the decision of the court to void the superseding statute. See State v. Kolocotronis, 73 Wash. 2d 92, 104-105 (1968).

Legislature would have enacted had the lawmakers known of the result in this case. That they would have provided for some penalty does not tell us what that penalty would have been.[9/] United States v. Evans, 333 U.S. 483, 495 (1948) (clear intent to punish proscribed conduct does not authorize court to fix a penalty where the statute is too uncertaion). See also Mayor of Boston v. Treasurer & Receiver Gen., Mass. Adv. Sh. (1981) 2351, 2364 (Hennessey, C.J., dissenting) (where Legislature had any number of alternatives available to it, it is sheer conjecture to say that one of these alternatives would not have been adopted). It is not for this court to

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9/ The point is highlighted by our inability to determine the intent of the Legislature when it enacted the 1980 amendments. See Commonwealth v. Gagnon, supra at 569-574.

establish criminal penalties. The opinion of the court therefore eschews this "rule of revival."

The judgments are reversed in so far as the indictments charge violations of G. L. c. 94C, § 32 (a), and the findings of the judge are set aside in so far as they find the defendants guilty of such violations. The cases are remanded to the Superior Court, where the judge is to enter an order dismissing the indictments except as to the lesser included offense of possession of heroin. Findings of guilty of that offense may be entered, and the defendants may be sentenced pursuant to G. L. c. 94C, § 34, which punishes the possession of heroin.[10/]

So ordered

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10/ The Commonwealth's motion to stay the issuance of a rescript is denied.

HENNESSEY, C.J. (dissenting). I dissent from the majority's decision that the defendants may now be punished only for the lesser included offense of possession of heroin.[1/] I would apply the "rule of revival" and order that the defendants be resentenced for the more serious crime of which they were convicted, unlawful distribution of heroin, under the law as it existed before the 1980 revision of G. L. c. 94C, § 32.

General Laws c. 94C, §32, was enacted in 1971. Pursuant to that statute, the manufacture, distribution, or dispensation of a class A or class B

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1/ The Chief Justice was not originally a participant in this matter, but was invited to join the quorum after issuance of the court's opinion, and after the Commonwealth filed a petition for rehearing. Justice Wilkins and Justice Lynch at an early stage in the proceedings each disqualified himself from particiapation in the case.

controlled substance, or the possession of such substance with the intent to manufacture, distribute, or dispense was punishable on first offense by imprisonment (not more than ten years in State prison or not more than two and one-half years in a jail or house of correction), by fine, or both. In 1980, §32 was replaced by nine new sections, §§ 32 through 32H, each dealing more or less with a specific class of drugs. St. 1980, c. 436, §4. We are concerned in this case with a class A controlled substance (heroin). The 1980 statutory revision made no change in the status of heroin as a class A controlled substance or in the proscribed conduct. The only changes related to the punishments.

I agree with the majority that §32 (a) is unconstitutional because the punishments as revised in that 1980

enactment are vague, uncertain, and confusing. I also agree that the defendants may now properly be punished for the lesser included offense of mere possession, since the controlling statute there (G. L. c. 94C, § 34) is constitutional in all respects. But this court should go farther and order that the defendants be resentenced under the rule of revival. This rule is simply that the unconstitutional amendment was void from its inception, and consequently never took effect to supersede the prior statute.

There is some precedent to indicate that this rule has long been part of the law in this Commonwealth. See Commonwealth v. Kimball, 299 Mass. 353 (1938); Opinion of the Justices, 269 Mass. 611 (1929); Lawton Spinning Co. v. Commonwealth, 232 Mass. 28 (1919).

Further, it is the established rule in other jurisdictions. State v. Bloss, 637 P.2d 1117 (Hawaii 1981). State v. Books, 225 N.W.2d 322 (Iowa 1975). State v. Dixon, 530 S.W.2d 73 (Tenn. 1975). State v. Collins, 528 S.W.2d 814 (Tenn. 1975). State v. Kolocotronis, 73 Wash. 2d 92 (1968). See Frost v. Corporation Comm'n of Oklahoma, 278 U.S. 515, 525-528 (1929); Davis v. Wallace, 257 U.S. 478, 485 (1922); Chicago, I. & L. Ry. v. Hackett, 228 U.S. 559, 566 (1913); People v. Fox, 294 Ill. 263 (1920). It is true that one case has held that the revival rule could not constitutionally be invoked because, in the circumstances there presented, the defendant did not have sufficient notice of the criminality of his conduct to satisfy the due process requirements of the Federal Constitution. United States

ex rel. Clark v. Anderson, 502 F.2d 1080 (3d Cir. 1974). That reasoning clearly does not apply here. It would border on the frivolous for the defendants or any other persons to argue that they were not on notice that, at all relevant times, distribution of heroin was and is a criminal offense in this Commonwealth. Nor could the defendants reasonably argue that they were ever in any uncertainty as to the precise crime charged against them. In light of these factors, all the majority's reasoning, whether premised in the Constitution or in policy, fails.

There is no persuasive reason why the rule of revival should not apply here. I have no doubt that this would be consistent with legislative intent. There is every reason to believe that the Legislature would prefer to revive

the former statute, rather than have a substantial period of time in which the reprehensible conduct involved here was not a criminal offense. I would remand this case to the Superior Court for resentencing of the defendants for the crime of distribution of heroin under G. L. c. 94C, § 32, as enacted in 1971.